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The Honorable RICHARDO MARTINEZ

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WASHINGTON ASSOCIATION OF
CHURCHES, et al.,

Plaintiffs,

v.

SAM REED, in his official capacity as
Secretary of State for the State of
Washington,

Defendant.

NO. CV06-0726 RSM

DEFENDANT REED'S
RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION

I. INTRODUCTION

Everyone agrees that fictitious persons should not register to vote. Therefore, an effective mechanism must be in place to ensure that the person applying for registration is, in fact, a real person. As a necessary corollary, that mechanism must ensure that if an applicant is not a real person that he or she should not be registered. As a direct result of the mandate of the federal Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301-15545, the Washington State Legislature and Secretary of State adopted a "match" system to do so.

1 In essence, Plaintiffs (“Associations”) claim that Washington’s matching system violates
 2 HAVA¹ because: (1) it is a robotic computer system without human overrides and, therefore, the
 3 smallest typographical error will instantly produce a mismatch and automatically delete an
 4 applicant’s registration, and (2) that if a match system is permitted, ultimately unresolved
 5 mismatched applicants must nonetheless be registered. The Associations request a preliminary
 6 injunction starting on August 5, 2006, or, in the alternative, September 23, 2006, against the
 7 Secretary of State and his “agents” from operating Washington’s match system.

8 In essence, Defendant Secretary of State responds: (1) HAVA requires a matching system
 9 and Washington’s system is far from robotic because it allows human overrides, with the evidence
 10 showing that these safeguards routinely result in initial mismatches being resolved and applicants
 11 successfully registering, and (2) HAVA requires that when a mismatch cannot be resolved with all
 12 the human override safeguards, the application “may not be accepted or processed[.]” 42 U.S.C.
 13 § 15483(a)(5)(A)(i). Before the Associations filed this suit alleging a robotic and standardless
 14 match system, the Secretary of State initiated the rulemaking process to adopt a detailed
 15 regulation specifically providing for human overrides of initial mismatches; the final rule was
 16 adopted as Wash. Admin. Code 434-324-040 on June 28, 2006. Furthermore, HAVA and the
 17 corresponding Washington statute create an alternative to matching. The statute, Wash. Rev.
 18 Code § 29A.08.113(1), allows a person to merely check a box and claim he or she does not have a
 19 driver’s license or Social Security number, which then allows him or her to only provide a utility
 20 bill or similar document—no match is required.

21 The Associations’ alarming claims that Washington’s matching system will result in
 22 mismatches in the “20 to 30 percent range” (Compl. ¶ 6) and will “disenfranchise thousands” of
 23

24 ¹ The Association’s primary allegation is that Washington’s match system violates HAVA. The other
 25 allegations (violations of Motor Voter, Voting Rights Act, Due Process, and Equal Protection) seem to flow
 26 directly from the Associations’ claim of a HAVA violation. This brief will focus primarily on why the Secretary
 of State is not violating HAVA. Given the short discovery and briefing schedule, the parties have agreed to
 supplement their briefs. If the Associations make arguments focusing on laws other than HAVA, the Secretary of
 State will respond in a forthcoming brief.

1 voters (Compl. ¶ 1) because of Washington's "no match, no vote" system (Pls.' Mot. for Prelim.
 2 Inj. at 2) stands in stark contrast to the facts deduced in discovery. Instead of "thousands," it looks
 3 like about 200 unresolved mismatches have occurred out of about 70,000 applications, a 0.3%
 4 mismatch rate.² This 0.3% mismatch rate is consistent with the fact that a small proportion of
 5 applicants move out of state or die after applying to register, or are otherwise not eligible to vote.
 6 As will be shown below, the Associations simply did not know enough about Washington's voter
 7 registration system when they filed their Complaint.

8 II. SUMMARY OF LEGAL ARGUMENT³

9 First and foremost, HAVA requires a matching system (42 U.S.C. § 15483(b)(1)) like
 10 Washington's and also requires that ultimately mismatched applications cannot be "accepted or
 11 processed" (42 U.S.C. § (a)(5)(A)(i)). Therefore, the Associations have not met their burden of
 12 proving that they are substantially likely to prevail on the merits.

13 Second, the Associations cannot show irreparable injury because applicants have two
 14 adequate remedies at law: the checking-box utility-bill alternative and voting a provisional ballot.

15 Third, the Associations have not shown that the balance of hardships tips in their favor.
 16 The harm to applicants who do not want to go through the matching system is to check a box or
 17 vote a provisional ballot. The harm to the Secretary of State and the people of Washington is that,
 18 without a matching system, more fictitious persons will vote.

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 22 ² Due to the short timeframes for discovery and briefing, discovery is still being conducted as this
 23 Response is being written, and the Associations have noted more depositions. Therefore, the facts might change
 24 somewhat in the final briefing. However, the testimony so far (as of July 11, 2006) is that 135 mismatches have
 occurred out of about 70,000 applications. In an abundance of caution, the Secretary of State has rounded the 135
 figure up to 200, divided by 70,000 (which is 0.28571%) and then rounded up to 0.3%.

25 ³ Due to the short timeframes for discovery and briefing, and to provide the Associations with fair notice
 26 of Secretary Reed's legal arguments, the parties agreed that this Response should be filed before discovery has
 been completed. Depositions are scheduled for after the filing of this Response, so new facts will probably
 emerge after this is filed. Therefore, the parties have agreed that new facts and issues will be addressed in a
 supplemental response.

1 Fourth, the public interest would not be served by issuing an injunction because it would
 2 prevent the State from employing an effective method of preventing fictitious persons from
 3 registering and would, therefore, dilute the votes of lawful voters in Washington.

4 Still other problems are presented by the Associations' requested relief. Voter registration
 5 is conducted by the 39 counties in Washington. The Secretary of State maintains a statewide
 6 voter registration list, but the registration of voters is actually conducted by each county auditor
 7 who is separately elected.⁴ The Associations have only named the Secretary of State as a
 8 defendant, yet seek an injunction against the Secretary of State and his "agents" to prevent the
 9 matching system from operating. The Secretary of State has no direct control over the actions of
 10 39 separately elected county auditors. If the Associations seek an injunction only against the
 11 Secretary of State, they seek an ineffective remedy because the Secretary of State does not
 12 actually register voters. If the Associations consider the county auditors to be the Secretary of
 13 State's "agents," the Associations are mistaken and are, therefore, in effect seeking an injunction
 14 against unnamed parties.

15 For these reasons, this Court should deny the Associations' Motion for Preliminary
 16 Injunction.

17 III. STATEMENT OF FACTS

18 The Associations essentially allege that Washington's matching system is a robotic
 19 computer system in which the difference between a single letter or number in a driver's license
 20 database and a person's name automatically kicks that person off the voting rolls, without the
 21 opportunity for human beings to intervene and correct a mistake. *See* Compl. ¶¶ 34, 134, 151.
 22 The Associations also allege that the Secretary of State has not adopted any standards for
 23 matching. *See* Compl. ¶¶ 42, 43, 68. Both allegations are incorrect.

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 26 ⁴ Thirty-eight counties have separately elected county auditors conducting elections; King County's
 election official is appointed but reports to an elected official.

1 On May 2, 2006, the Secretary of State proposed amendments to Wash. Admin. Code
2 434-324-040. See Decl. Greg Overstreet, Ex. A. The proposed rule provided that county
3 elections officials had general discretion to resolve initial mismatches and also provided specific
4 direction that transposed names, for example, should be considered a match. The notice of
5 proposed rulemaking provided that the Secretary of State intended to adopt a final version of the
6 rule on June 20, 2006. Overstreet Decl. However, on May 24, 2006, the Associations filed their
7 Complaint. Then on June 28, 2006, the Secretary of State adopted the amendments to Wash.
8 Admin. Code 434-324-040 in substantially the same form as proposed on May 2, 2006.
9 Overstreet Decl., Ex. B.

10 The final version of WAC 434-324-040 provides in pertinent part:

11 (4) If the applicant provided a Washington driver license number or state
12 identification number and the identity is not verified automatically, the
13 information on the application may be considered a "match" for purposes of
14 RCW 29A.08.107 if the number on the application exactly matches a number
15 issued by the department of licensing, and it is clear that the information on the
16 application describes the person on the department of licensing record. The
17 county auditor may conclude that the information on the application matches
18 the department of licensing record if:

15 (a) The first or middle name on the application is a variation of the first
16 or middle name in the department of licensing record;

16 (b) The first, middle, or last name has transposed letters or another
17 typographical error on the application or in the department of licensing record;

17 (c) The first or middle name is abbreviated with initials on the
18 application or in the department of licensing record; or

18 (d) The month and day of the applicant's date of birth are transposed on
19 the application or in the department of licensing record.

19 If the information on the application matches the information maintained
20 by the department of licensing, the county auditor may override the automated
21 failure to verify and must note the reason it is considered a match.

21 (5) If the applicant's driver's license or state identification number
22 cannot be considered a match, the county auditor must attempt to contact the
23 applicant to resolve the discrepancy, as required by RCW 29A.08.107. At a
24 minimum, the county auditor must send a verification notice, as required by
25 RCW 29A.08.030, 29A.08.110, and 29A.08.210, and may attempt to contact the
26 applicant by phone or e-mail. The county auditor may attempt to confirm the
27 applicant's driver's license number or state identification number, obtain the
28 last four digits of the applicants' Social Security number, or obtain an
29 alternative form of identification as allowed by RCW 29A.08.113.

29 (6) If the applicant provided the last four digits of his or her Social
30 Security number and the identity is not verified automatically, the county
31 auditor must contact the applicant to resolve the discrepancy, as required by

1 RCW 29A.08.107. At a minimum, the county auditor must send a verification
 2 notice, as required by RCW 29A.08.030, 29A.08.110, and 29A.08.210, and may
 3 attempt to contact the applicant by phone or e-mail. The county auditor may
 4 attempt to confirm the last four digits of the applicant's Social Security number,
 5 obtain a Washington driver's license number or state identification number, or
 6 obtain an alternative form of identification as allowed by RCW 29A.08.113.

(7) Once the applicant's identity has been verified, the county auditor
 must change the voter's registration code in the county election management
 system from pending status to active. Consistent with RCW 29A.08.110, the
 applicant is considered registered as of the original date of mailing or date of
 delivery, whichever is applicable.

7 The evidence further shows that county elections officials go above and beyond the
 8 requirements of Wash. Admin. Code 434-324-040. *See* Dep. Pam Floyd at 57, 71-72 (attached as
 9 Ex. C to Overstreet Decl.). For example, one county elections official describes how she resolved
 10 an initial mismatch of a Spanish-speaking applicant by driving to the applicant's house and
 11 looking at her driver's license. *See* Decl. Rosa Fernandez.⁵ Another way county elections
 12 officials exceed the measures described in Wash. Admin. Code 434-324-040 is the extensive use
 13 of commercial data bases (e.g., Lexis-Nexis public records) to find information, such as a correct
 14 name or date of birth after an initial mismatch. *See* Dep. Paul Miller at 203-04 (attached as Ex D.
 15 to Overstreet Decl.); Floyd Dep. at 37-38. The Lexis-Nexis information is compared to the
 16 information on the application so an error on the application can be quickly resolved and the
 17 applicant can be registered. *Id.* In fact, in the months of April and May, 2006, alone, county
 18 elections officials ran 3,083 such Lexis-Nexis searches. *See* Ex. 16 to Dep. Steve Excell (attached
 19 as Ex. E to Overstreet Decl.).

20 The evidence also shows that county elections officials allow the use of the check-box
 21 alternative to matching, which is provided for by HAVA (42 U.S.C. § 15483(b)(2)(A)(ii)) and
 22 Washington law (RCW 29A.08.113(1)). *See* Floyd Dep. at 44. As previously described, under
 23 this alternative to matching, an applicant merely checks the box on the registration form that he or
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25 _____
 26 ⁵ The Declaration of Rosa Fernandez attaches the voter registration application of Maria Silva. Counsel
 for Defendant redacted Ms. Silva's driver's license number and date of birth from to preserve her privacy.

1 she has neither a driver's license number or Social Security number and then the county elections
2 official accepts alternate forms, such as a current utility bill. Floyd Dep. at 44.

3 County elections officials' efforts usually resolve an initial mismatch so that the applicant
4 can register. In sum, only about 200 out of approximately 70,000 (0.3%) applicants were not
5 registered because of mismatches. *See* Miller Dep. at 204.

6 **A. Statutory Framework**

7 The Associations claim HAVA exists to encourage broad voter registration. *See* Compl.
8 ¶ 74. This is half true. While HAVA encourages broad voter registration of eligible voters,
9 HAVA also provides significant safeguards to prevent voter fraud by ensuring that fictitious
10 persons do not register. For example, HAVA requires a state's voter registration system to
11 "include provisions to ensure that voter registration records . . . are accurate and are updated
12 regularly[.]" 42 U.S.C. § 15483(a)(4).

13 **B. Matching Requirement**

14 **1. HAVA Requires A Matching System**

15 HAVA accomplishes its goal of preventing the registration of fictitious persons by
16 requiring a matching system. 42 U.S.C. § 15483(a)(5)(B) requires state election officials to
17 "match information in the database of the statewide voter registration system" with driver's
18 license, Social Security, and other information. HAVA requires a matching system with enough
19 teeth to "enable [elections officials] to verify the accuracy of the information provided on
20 applications for voter registration." 42 U.S.C. § 15483(a)(5)(B)(i). HAVA gives states the
21 discretion to design a matching system as long as it complies with the act. *See* 42 U.S.C. § 15485
22 ("The specific choices on the methods of complying with the requirements of this subchapter shall
23 be left to the discretion of the State.").

24 **2. HAVA Requires That An Ultimately Mismatched Application Be Denied**

25 HAVA requires that applicants providing driver's license or Social Security numbers that
26 do not match "may not be accepted or processed[.]" 42 U.S.C. § 15483(a)(5)(A)(i).

1 **3. According To The Department Of Justice, HAVA Requires Both A**
2 **Matching System And That Ultimately Mismatched Applications Be**
3 **Denied**

4 The United States Department of Justice has considered both of the Associations’
5 arguments and comes to the opposite conclusion. The Department of Justice has advised that:
6 (1) HAVA requires a state to have a matching system, and (2) an ultimately mismatched applicant
7 cannot be registered. When Maryland wondered if a state could register voters without a
8 matching system, the Department of Justice informed them that a match was required. See Letter
9 from Hans A. von Spakovsky to Judith A. Arnold, dated Sept. 8, 2003 (copy attached as Ex. F to
10 Overstreet Decl.) (“DOJ Letter”).⁶ The Department of Justice did not mince words:

11 The obvious purpose of [HAVA’s matching] provisions is to ensure that only
12 eligible individuals are registered to vote, and that those individuals only have one
13 registration at any given time on a statewide list.

14 [It is clear under [42 U.S.C. § 15483] that a State *must* set up a verification system
15 that enables it to determine whether the information provided by a registrant is
16 accurate by comparing it to its own state motor vehicle driver’s license records or
17 federal social security records. . . . Where the results [of the matching process]
18 indicate the registrant is not eligible, has provided inaccurate or fraudulent
19 information, or information that cannot be verified, then the application must be
20 *denied*. . . [A] State that does not takes [sic] the steps required by the statute to
21 verify this information prior to making a registration effective would appear to be
22 in clear *violation* of HAVA.

23 DOJ ltr. at 3 (emphasis added).

24 **C. Washington’s System For Voter Registration By Mail**

25 **1. Washington’s Matching System**

26 Washington’s matching system applies to an applicant who provides a driver’s license or
the last four digits of a Social Security number on his or her registration form. Wash. Rev. Code
§ 29A.08.107(1). Washington’s system then matches the numbers provided by the applicant with
driver’s license or Social Security records to verify that a person with one of those numbers exists

⁶ The letter is not necessarily the official position of the Department of Justice, but Defendant is aware of no evidence that the Department of Justice has taken a different position.

1 and is alive.⁷ For the details of the matching process, *see* Defs.' Resp. to Pls.' First Set of
2 Interrogs. at 6-12 (attached as Ex. G to Overstreet Decl.); Floyd Dep. at 28-30.

3 In addition to the human override features specifically listed in Wash. Admin. Code 434-
4 324-040, county elections officials have wide discretion to use their judgment to determine that
5 the applicant matches, despite a minor glitch. *See* Floyd Dep. at 53-54. County elections officials
6 often do so. Floyd Dep. at 57. *See also* Fernandez Decl. (driving to applicant's house) & Ex. E of
7 Overstreet Decl. (3,083 Lexis-Nexis searches by county elections officials in April and May,
8 2006). With safeguards like the general discretion and specific examples of solutions in Wash.
9 Admin. Code 434-324-040—and especially with county elections officials who go out of their
10 way to register applicants—it is no wonder that ultimately unresolved mismatches are as low as
11 0.3%.

12 **a. Washington's System Provides That Ultimately Mismatched**
13 **Applications Are Denied**

14 Washington's statutes are designed to comply with HAVA by assuring that
15 (1) applicants are promptly registered if they give identification numbers which can be
16 matched through reference to state or federal databases, while (2) those whose numbers do not
17 initially match have an opportunity to resolve the issue or supply alternative identification, but
18 (3) those applicants who fail to provide any information remain unregistered.

19 Wash. Rev. Code § 29A.08.110(1),⁸ effective Jan. 1, 2006, provides:

20 An application is considered complete only if it contains the applicant's
21 name, complete valid residence address, date of birth, signature attesting to the
truth of the information provided, a mark in the check-off box confirming

22 ⁷ As Plaintiffs admit, a driver's license and state identification card are the same for purposes of this
23 case. Accordingly, this Response will refer only to a driver's license number.

24 ⁸ Nothing, of course, prevents an applicant from filing a new registration application at any time, either
25 during the pendency of an earlier application or after the expiration of the 45-day period mentioned in the statute.
26 Furthermore, the state does not regard the 45-day provision as *mandating* the cancellation of an application if the
auditor has any reason to believe that additional information to complete the application is forthcoming. The 45-
day provision permits the county and the state to cancel applications where the applicant simply cannot be located
or has provided no information which can be verified, and it is clear that no additional verifiable information will
be provided.

1 United States citizenship, and an indication that the provided driver's license
 2 number, state identification card number, or Social Security number has been
 3 confirmed by the secretary of state. If it is not complete, the auditor shall
 4 promptly mail a verification notice of the deficiency to the applicant. This
 5 verification notice shall require the applicant to provide the missing
 6 information. If the verification notice is not returned by the applicant within
 7 forty-five days or is returned as undeliverable, the name of the applicant shall
 8 not be placed on the official list of registered voters. If the applicant provides
 9 the required verified information, the applicant shall be registered to vote as of
 10 the original date of mailing or date of delivery, whichever is applicable.

11 As noted elsewhere, Wash. Admin. Code 434-324-040 requires county auditors to
 12 make every reasonable effort to verify the information provided by the applicant, or to contact
 13 the applicant to obtain other information which will permit registration. Thus, there is very
 14 little chance that an applicant who is legally eligible to vote will be ultimately rejected because
 15 there is no "HAVA match." However, the system is designed to prevent registering fictitious
 16 or dishonest applicants who simply cannot, or will not, supply documentation confirming their
 17 eligibility.

18 **2. Check-Box Alternative To Matching Driver's License Or Social Security
 19 Numbers**

20 Not everyone has a driver's license or Social Security number. Therefore, an alternate
 21 non-matching system exists for a person who merely checks a box on the voter registration
 22 application stating that he or she does not have either a driver's license or Social Security number.
 23 Wash. Rev. Code § 29A.08.113(1) provides:

24 If a voter who registered by mail indicates on the voter registration form
 25 that he or she does not have a Washington state driver's license, Washington state
 26 identification card, or Social Security number, he or she must provide one of the
 following forms of identification the first time he or she votes after registering:

- (a) Valid photo identification;
- (b) A valid enrollment card of a federally recognized Indian tribe in Washington state;
- (c) A copy of a current utility bill;
- (d) A current bank statement;
- (e) A copy of a current government check;
- (f) A copy of a current paycheck; or
- (g) A government document that shows both the name and address of the voter.

1 The voter registration forms provide a check-box for applicants who claim to have neither
 2 a driver's license nor a Social Security number.⁹ See Ex. H to Overstreet Decl. (voter registration
 3 form in various languages). No match is required if the box is checked; instead, the applicant is
 4 allowed to provide a current utility bill or other document. Wash. Rev. Code § 29A.08.113(1).
 5 See also Floyd Dep. at 44.

6 IV. LEGAL ARGUMENT

7 The Associations seek a preliminary injunction, beginning on August 5, 2006, or
 8 September 23, 2006, prohibiting the Secretary of State and its agents from "refusing to register
 9 voters whose information cannot be 'matched'". Compl. at 40. For reasons previously discussed,
 10 a prohibition on matching or allowing ultimately mismatched applicants to register would violate
 11 HAVA. This section of the brief describes why the Associations have failed to meet their burden
 12 of satisfying all the required elements of a preliminary injunction.

13 A. Standards For Granting A Preliminary Injunction

14 To obtain a preliminary injunction under Fed. R. Civ. P. 65, the Associations must
 15 demonstrate: "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable
 16 injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the
 17 plaintiff, and (4) advancement of the public interest (in certain cases)." *Save Our Sonoran, Inc. v.*
 18 *Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (quotation omitted). Under the "sliding scale"
 19 alternative to this test, the Associations must demonstrate "*either* a combination of probable
 20 success on the merits and the possibility of irreparable injury *or* that serious questions are raised
 21 and the balance of hardships tips sharply in [their] favor." *Id.* (emphasis in original).

22 An injunction in an ordinary case is a "harsh and drastic" remedy. *Abend v. MCA, Inc.*,
 23 863 F.2d 1465, 1479 (9th Cir. 1988) (quotation omitted). Therefore, the party seeking an
 24
 25

26 ⁹ The form actually has a check circle, not a box, but the term "check-box" has been used in this case.

1 injunction must make a “clear showing” that it is entitled to such an unusual remedy. *Conn. Gen.*
 2 *Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881 (9th Cir. 2003) (citation omitted).

3 “[E]lection cases are different from ordinary injunction cases.” *Sw. Voter Registration*
 4 *Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (overruling trial court’s grant of
 5 preliminary injunction against use of punch-cards in upcoming state election and against holding
 6 recall election). A “federal court cannot lightly interfere with or enjoin a state election.” *Id.* at
 7 918 (citation omitted). Accordingly, “Interference with impending elections is extraordinary.” *Id.*

8 **B. The Associations Have Not Demonstrated A Strong Likelihood Of Success On The**
 9 **Merits**

10 As previously noted, HAVA *requires* a matching system. *See* 42 U.S.C. § 15483(a)(5)(B)
 11 (requiring state election officials to “match information in the database of the statewide voter
 12 registration system” with driver’s license, Social Security, and other information). *See also* 42
 13 U.S.C. § 15483(a)(5)(B)(i) (requiring state election officials to “verify the accuracy of the
 14 information provided on applications for voter registration” in order to be matched). If matching
 15 is required—and it is—then Washington elections officials must obtain applicants’ driver’s
 16 license number, Social Security number, or other information in order to perform their legal
 17 obligation of assessing the eligibility of the applicant to register to vote. The Department of
 18 Justice letter to Maryland merits repeating here:

19 [I]t is clear under [42 U.S.C. § 15483] that a State *must* set up a verification system
 20 that enables it to determine whether the information provided by a registrant is
 21 accurate by comparing it to its own state motor vehicle driver’s license records or
 22 federal social security records. . . . Where the results [of the matching process]
 23 indicate the registrant is not eligible, has provided inaccurate or fraudulent
 24 information, or information that cannot be verified, then the application must be
 25 *denied*. . . [A] State that does not takes [sic] the steps required by the statute to
 26 verify this information prior to making a registration effective would appear to be
 in clear *violation* of HAVA.

DOJ Ltr. at 3 (emphasis added). Because HAVA *requires* a match before registration is allowed
 for applicants providing a driver’s license or Social Security number, the Associations’ request for

1 a preliminary injunction *prohibiting* the Secretary of State and its agents from doing so should be
2 denied. The Associations are asking the Court to order the Secretary of State to act in violation of
3 a federal law and, therefore, they cannot show a strong likelihood of success on the merits.

4 To the extent that the Associations' case is based on a robotic and standardless matching
5 system, the adoption of Wash. Admin. Code 434-342-040 demonstrates that the Associations have
6 not shown a strong likelihood of success on the merits.

7 This lack of a strong likelihood of success on the merits affects the next element,
8 irreparable injury. Under the "sliding scale" test for granting a preliminary injunction, "as the
9 probability of success [on the merits] decreases", the "required degree of irreparable harm
10 increases." *Save Our Sonoran*, 408 F.3d at 1120 (quotation omitted). As will be shown, the
11 Associations cannot meet their burden—especially their increased burden—of showing
12 irreparable injury.

13 C. The Associations Cannot Show Irreparable Injury

14 1. Speculative Injury Is Insufficient

15 The Associations must show this Court actual, demonstrable injury. "Speculative injury
16 does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739
17 F.2d 466, 472 (9th Cir. 1984) (citation omitted).

18 Injunction issues to prevent existing or presently threatened injuries. One will not
19 be granted against something merely feared as liable to occur at some indefinite
20 time in the future. [B]are allegations of what is likely to occur are of no value
21 since the court must decide whether the harm will *in fact* occur. The movant must
22 provide proof that the harm has occurred in the past and is likely to occur again, or
23 proof indicating that the harm is certain to occur in the near future. To slap
injunctions on state officials who have never violated the law or shown any
intention to violate the law would exceed the proper bounds of equitable
discretion.

24 *Bloodgood v. Garraghty*, 783 F.2d 470, 475-76 (4th Cir. 1986) (citations and internal quotation
25 marks omitted).

1 The existence of Wash. Admin. Code 434-324-040 requires the Court to speculate wildly
 2 about future events and generalize about the actions of a diverse group of people. Under Wash.
 3 Admin. Code 434-324-040, election officials will be using their judgment to add applicants to the
 4 voter rolls when, for example, a number or name has been transposed. This means that in order to
 5 grant a preliminary injunction, the Court must speculate that election workers will routinely fail to
 6 properly exercise their discretion to resolve initial mismatches in favor of registration. The
 7 evidence shows just the opposite, a 0.3% mismatch rate. This speculation is not a solid basis upon
 8 which to order a preliminary injunction.

9 In election cases, claims of speculative injury have been found to be especially insufficient
 10 to allow the drastic remedy of a preliminary injunction against state election procedures. For
 11 example, in *Sw. Voter*, 344 F.3d 914, plaintiffs claimed that punch-card ballots were inaccurate
 12 and, therefore, disenfranchised some voters by not counting their votes.¹⁰ The plaintiffs in that
 13 case presented evidence that the punch-card ballots caused as many as 2.23% of votes to remain
 14 uncounted, and the state had previously agreed to discontinue the use of punch-card ballots in
 15 future elections. *Id.* at 917. Even with this evidentiary showing, the Ninth Circuit (en banc) did
 16 not uphold a preliminary injunction against the punch-card election procedures:

17 We must of course also look at the interests represented by the plaintiffs,
 18 who are legitimately concerned that the use of the punch-card system will deny the
 19 right to vote to some voters who must use that system. At this time, it is merely a
 20 speculative possibility, however, that any such denial will influence the result of
 the election.

21 *Id.* at 919-20.

22 The Associations in this case have shown much less harm than the plaintiffs in *Sw. Voter*,
 23 where a 2.23% disenfranchisement rate was alleged. In our case, it appears that about 0.3% of

24
 25 ¹⁰ The case before this Court is both like and unlike the case in *Sw. Voter*. Like *Sw. Voter*, which
 26 involved a voting procedure (the use of punch-card ballots), the Associations seek a preliminary injunction against
 a voting procedure (voter registration matching). Unlike *Sw. Voter*, the Associations do not seek an injunction
 against holding an election.

1 applicants have not been matched. The fact that only a tiny number of applicants have not been
 2 registered might explain why no plaintiff in this case is an actual person who is likely to be denied
 3 registration because of Washington's match system.¹¹

4 **a. The Check-Box Alternative And Provisional Ballots Mean All**
 5 **Applicants Have An Effective Remedy At Law**

6 Of course, a court should not grant a preliminary injunction if an adequate remedy at law
 7 exists. *See Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (citation omitted).
 8 As previously noted, Wash. Rev. Code § 29A.08.113 provides two alternatives to matching: the
 9 check-box and provisional ballot. Therefore, RCW 29A.08.113 provides a legal remedy for a
 10 person who does not, or cannot, match. These legal remedies are easily within reach of an
 11 applicant, requiring only that a person check a box or vote a provisional ballot. No applicant is
 12 forced to file suit to obtain these legal remedies—merely checking a box suffices.

13 It is worth noting that the Associations have an “increased” burden of proving irreparable
 14 injury because they cannot show a substantial likelihood of success on the merits. *Save Our*
 15 *Sonoran*, 408 F.3d at 1120. Given the two readily available legal remedies providing alternatives
 16 to matching, the Associations cannot meet their “increased” (or even a normal) burden of proving
 17 they have no adequate remedy at law.

18 **2. A Preliminary Injunction Cannot Provide Effective Relief**

19 A court should not issue an injunction that cannot provide effective relief. *See Estate of*
 20 *Marcos*, 94 F.3d 539, 545 (9th Cir. 1996) (“a court of equity may refuse to give any relief when it
 21 is apparent that that which it can give will not be effective or of benefit to the plaintiff.”) (quoted
 22 source omitted).

23
 24
 25 ¹¹ The Associations' standing is very questionable in this case. However, given the speed with which
 26 this case has been moving, the Secretary of State has not challenged the Associations' standing, which would
 require discovery to confirm the facts underlying the Associations' standing or lack of standing. The Secretary of
 State will rely on substantive defenses at this point. However, if the case goes to trial, the Secretary of State will
 consider conducting discovery and briefing the standing issue.

1 **a. The Case Might Be Moot**

2 A case is moot “where the issues are no longer live”. *Sample v. Johnson*, 771 F.2d 1335,
3 1338 (9th Cir. 1985). This case is moot if the Associations allege that Washington’s matching
4 system is robotic and standardless because of Wash. Admin. Code 434-342-040.

5 **b. The Status Quo Cannot Be Preserved**

6 The purpose of a preliminary injunction is to preserve the status quo to allow a trial on the
7 merits. *See Dep’t of Parks & Recreation for Cal. v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118,
8 1124 (9th Cir. 2006). The status quo in this case has radically changed. The Associations’
9 Complaint does not mention the current version of Wash. Admin. Code 434-324-040. Therefore,
10 the “status quo” described in the Complaint—and the “harm” the Associations ask this Court to
11 preliminarily enjoin—is a WAC-less matching process that no longer exists. A court should not
12 issue an injunction that attempts to preserve a false “status quo.”

13 **c. At This Point The Court Cannot Enjoin The Parties Who Actually**
14 **Register Voters: The Counties**

15 An injunction is only valid against a named party, the party’s “agents,” and those “acting
16 in concert” with the named party. Fed. R. Civ. P. 65(d). If the persons responsible for the
17 conduct are not parties or otherwise subject to the injunction, then the court cannot provide an
18 effective remedy. The Associations named only the Secretary of State as a defendant but failed to
19 name the 39 county auditors who actually register applicants. The Secretary of State maintains
20 the voter statewide registration list (Wash. Rev. Code § 29A.08.651), but the counties actually
21 register voters (Wash. Rev. Code § 29A.08.110(2)). The Secretary of State has no direct control
22 over 39 separately elected county auditors. Far from it. The Associations have not shown, and
23 cannot show, how the counties are the “agents” of the Secretary of State, such that the Secretary
24 of State could somehow order the counties to register mismatched applicants. (Besides, such an
25 “order” from the Secretary of State would violate HAVA.) Therefore, if the Court granted the
26 Associations’ requested relief of enjoining the *Secretary of State* from requiring matching as

1 provided in Wash. Rev. Code § 29A.08.107, nothing would change. County elections officials
 2 could still require matching and could decline to register ultimately mismatched applicants
 3 because they are not subject to the injunction. The Associations could cure this problem by
 4 amending their Complaint and adding all the county auditors but, given the current lone defendant
 5 in this case, this Court cannot grant effective relief.

6 **D. Balance Of Harms Does Not Favor The Associations**

7 The Associations must show the “balance of hardships favoring” them. *Save Our*
 8 *Sonoran*, 408 F.3d 1120. The harm to the Associations is non-existent because associations do
 9 not register to vote. Looking instead at the effect of Washington’s matching system and its
 10 alternatives on the Associations’ members, the Associations still come up short of their burden of
 11 proving “harm.” The Associations’ members can simply *check a box* and provide a copy of a
 12 utility bill or similar document (or vote a provisional ballot) to escape the matching system.¹²
 13 Wash. Rev. Code § 29A.08.113(1). The registration form even explains this (in English, Spanish,
 14 Korean, Chinese, Cambodian, Vietnamese, Laotian, and Russian). *See* Ex. H to Overstreet Decl..
 15 Therefore, the harm to the Associations’ members is that they must check a box or vote a
 16 provisional ballot. This is hardly the kind of harm worthy of a federal injunction.

17 However, the harm to the Secretary of State—actually, to the people of Washington—is
 18 significant if the matching process is enjoined. Without matching, some fictitious persons may be
 19 allowed to vote, whether they provide a false name or purport to be registering on behalf of a dead
 20 person. Without a matching process, more unlawful votes may be cast, thus diluting the voting
 21 power of lawful voters.

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 25 ¹² If the voter checks the box indicating that he or she does not have a driver’s license or Social Security
 26 as a provisional ballot and counted based on a comparison between the signature on the ballot envelope and the
 signature on the voter registration form. Wash. Rev. Code § 29A.08.113(2).

1 **E. The Associations Have Not Proven That The Public Interest Requires A**
2 **Preliminary Injunction**

3 The last element the Associations must prove is the "advancement of the public interest."
4 *Save Our Sonoran*, 408 F.3d at 1120. *See also Sw. Voter*, 344 F.3d at 917 (public interest must be
5 considered in election injunction case). The public interest is of *all* voters in the state, not just the
6 handful of persons affected by the voting procedure. *Id.* at 919. Given that any potential
7 applicants who are concerned about the matching system may check a box and use the utility-bill
8 alternative, it is hard to see how the public interest requires a federal court to enjoin a state
9 election procedure. Quite simply, HAVA and the corresponding Washington statutes anticipated
10 any problems with the matching system and provided two alternatives. Applicants should use
11 those alternatives instead of seeking a federal court injunction.

12 **V. CONCLUSION**

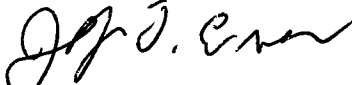
13 For the reasons discussed above, the Court should deny Plaintiffs' Motion for Preliminary
14 Injunction.

15 DATED this 12th day of July, 2006.

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